Supreme Court of the United States

OCTOBER TERM, 1966

No. 254

THEODORE STOVALL, PETITIONER

vs.

WILFRED DENNO, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Southern District of New York		
Application for a writ of habeas corpus	1	1
Motion for leave to proceed in forma pauperis and affidavit in support (omitted in printing)	9	9
Order allowing filing in forma pauperis	11	10
Motion to amend the petition for writ of habeas corpus and affidavit	12	11
Opinion, Wyatt, J.	15	14

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit	22	18
Appendix for relator-appellant (excerpts)	22	18
Minutes of arraignment on August 25, 1961 in the First District Court	23	19
Minutes of arraignment on August 31, 1961 in the First District Court	27	21
Opinion, Friendly, J., dated March 31, 1965	32	24
Dissenting opinion, Moore, J.	43	34
Judgment, dated March 31, 1965	45	36
Opinion, en banc, Moore, J., dated January 31, 1966	47	37
Concurring opinion, Lumbard, C. J.	62	50
Dissenting opinion, Friendly, J.	67	54
Dissenting opinion, Smith, J.	73	59
Order vacating judgment of March 31, 1965	74	60
Judgment	76	61
Clerk's certificate (Omitted in printing)	78	62
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	79	62

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civ. 1505

[File Endorsement Omitted]

THE UNITED STATES OF AMERICA, EX REL., THEODORE R. STOVALL, RELATOR

-against-

WILFRED L. DENNO, Warden, Sing Sing Prison, County of Westchester, State of New York, RESPONDENT

28 U.S.C. 2241

APPLICATION FOR A WRIT OF HABEAS CORPUS—filed May 14, 1964

The application of Theodore R. Stovall, for a writ of habeas corpus respectfully shows to this Court and alleges:

FIRST: That, he is the relator, Theodore R. Stovall, the person on whose behalf this application is made, and that he is imprisoned, restrained and detained of his liberty at the Sing Sing Prison, County of Westchester, and that the person by whom he is so imprisoned, restrained and detained is Wilfred L. Denno, as Warden of the Sing Sing State Prison.

SECOND: That, the cause or pretense of the cause of the imprisonment, detention and restraint is a certain commitment issued by the County Court of Nassau County, based upon an indictment charging him with the crime of murder in the first degree, and two counts of attempted murder in the first degree.

THIRD: That, the relator is unjustly and illegally threatened with the forfeiture of his life sometime during the

week of *June 8, 1964*, by the above named Warden of Sing Sing Prison as agent of the people of the state of New York.

FOURTH: That, relator has not been committed and is not legally detained by virtue of any final judgment or decree, or any final order, mandate or process, and this application is filed and submitted pursuant to *Title 28, Section 2241 of the United States Code.*

FIFTH: That, the restraint, imprisonment and detention of the relator are illegal in that it violates the *4th, 5th* and *14th Amendment to the Constitution of the United States of America.*

[fol. 2] That, the facts upon which this claim is based are as follows:

Heretofore, on the 1st day of August, 1961, relator was indicted by the Grand Jury of Nassau County charging him with murder and attempted murder in the first degree. On the 1st day of September, 1961, he was duly assigned and did request assignment of counsel. That court entered a plea of Not Guilty, and counsel was thereafter assigned to conduct his defense.

Thereafter, a trial under this indictment was had before County Court Judge Paul Kelly, and a jury; which resulted in a verdict of Guilty of felony murder-no recommendation; Guilty of second degree murder; Guilty of attempted murder, and on the 6th day of September, 1962, a sentence of death was imposed.

> Relator has no copy of the Certified Record of his trial in his possession. This petition has been prepared through his own knowledge of what had transpired. Figures hereinafter in parenthesis indicate folio references of record as indicated in the brief submitted before the New York State Court of Appeals.

Relator was arrested without a warrant in his sister's house. The arresting officer took him into custody on alleged information purported to have been received by one, Detective Rofheart. The state prosecutor claims that an unnamed informer, "just happened to remember a tele-

phone number, he heard being used by a total stranger, while in a tavern drinking" [1707, 3193] which subsequently led to the arrest of your relator. This claim stands completely unsubstantiated and rather incredible when one considers the following:

(A) It is extremely doubtful whether or not there really was any informant or phone call made by anyone;

(B) If there was such an informant it was the duty of the prosecution to produce such person to show whether he or she was and is a reliable source of information. See: *P.* v. *Coffey*, 11 N.Y.2d 142; *Wong Sun* v. *U.S.*, 371 U.S. 471.

[fol. 3] (C) If there was no such informant or if such informant was found not to be reliable as a source of information, then the arrest of relator was in direct *violation of the 4th Amendment to the Constitution of the United States.*

Relator urges that this arrest is inherently illegal and that the use of evidence taken from his home and possession in Jamaicia, Queens, New York [146-147, 165] was the cause of arrest and violated his rights under the *4th* and *14th Amendments to the Constitution of the United States.*

Obviously, by the fact that the arresting officers were unable to produce information sufficient to show probable cause and thereby get a warrant to arrest relator, the whole question of this alleged informant is highly suspect. This arrest can in no way be termed legal, therefore the use of relators clothing should have been omitted from use at his trial, as motioned for by his attorney, and its use comes under the "poison tree fruits" rulings. *P.* v. *Jackson, Robinson, N.Y. Ct. of App. 12-30-63; Wong Sun* vs. *U.S.*, supra.

As the standing rule is, "a search is neither good nor bad because of its success in revealing evidence of a crime and does not become legal because of what it has brought to light," and the fact that the police were unable to obtain any warrant the illegality of the seizure began at its inception, the "taking of relator into custody."

The Supreme Court of the United States has left no room for doubt concerning the mandate of the *4th Amendment to the Constitution of the United States* when it said:

> "* * * it is enforceable against the States by the same sanction of exclusion as is used against the Federal Government, by the application of the same Constitutional standard prohibiting unreasonable searches and seizures * * *." *Ker* v. *Calif.*, 374 U.S. 23, 46.

As the word "person" is contained in the 4th Amendment, than the use of any oral evidence which may be obtained in the course of any illegal seizure is and must be prohibited from use at any subsequent trial.

Furthermore, the intimate relationship held by the [fol. 4] *4th* and *5th Amendments to the Constitution of the United States* when supported by the *14th Amendment* prohibit use of any statements elicited from your relator regardless of whether they were incriminating or exculpatory. The mere fact that they were unconstitutionally seized is enough to ban their admission at any subsequent trial.

Relator further urges that his Constitutional rights guaranteed by the *14th Amendment to the Constitution* were violated when the conflicting nature of an alleged eye-witness, victim's testimony was permited to go uncorrected. A brief summary of such conflicting testimony, vital to say the least, follows:

> she saw defendant's face clearly (2062)
> she saw assailant only for a fleeting moment (2110-2113)
> she could describe skin color and facial features (2192-2193), did not notice the fact that relator had unusual eyes [relator is very cross-eyed] (1185-1186) a fact that would be noticed immediately by anyone, especially witness who is a doctor.

Compare these statements by this witness taken on September 1, 1961, where she positively identifies relator as assailant; her statement of September 20, 1961, where witness stated that her head was "not clear" when she

gave police the September 1, 1961, statement, combined with the fact that on August 25, 1961, after he had been arraigned and ordered held for grand jury and pending assignment of counsel, he was removed from the County Jail against his will and forced to accompany police to a hospital where identification was made under the following conditions:

(1) He was the only negro in the room and handcuffed to a police officer (1191);

(2) He was forced, threatened and coerced into speaking for purposes of eliciting identification as to vocal tones (1802-1804) [assailant had high-pitch voice (2064)];

(3) The action by the police was in direct violation of state court rulings, *P.* v. *Meyers*, 11 N.Y.2d 162; *P.* v. *Rodriguez*, 11 N.Y.2d 279, but also denied this [fol. 5] relator the right to assistance of counsel at a "vital stage after being before a judge" and such action by police officials reduced to nothing, his rights as guaranteed by the *5th and 14th Amendments to the Constitution of the United States.*

SIXTH: That, on the third day of October, 1963, an appeal was taken by relator to the New York State Court of Appeals. On the 30th day of December, 1963, that court affirmed the judgment of conviction.

Thereafter, on the 23rd day of January, 1964, motion for reargument was denied by that court but the remittitur was amended to show that relators rights under the 4th, 5th and 14th Amendments to the United States Constitution were necessarily passed upon and held no violation of any rights of relator was had.

On the 11th day of February, 1964, a copy [certified] of an Order dated the 7th day of February, 1964, signed by Hon. Stanley H. Fuld, Associate Judge of the New York State Court of Appeals was received by the prison authorities, thereby staying the execution of relator, pending "timely filing" and determination on a petition for a writ of certiorari in the United States Supreme Court.

Thereafter, on the 11th day of February, 1964, relator was visited by his appeal attorney, Mr. John C. Schettino,

Esq., 398 Central Avenue, Lawrence, New York, and told that a "timely petition" would be filed in the United States Supreme Court for a writ of certiorari and that relator should not do anything but wait things out.

As 90 days is the prescribed time for applying for certiorari, and an execution delay is for that period of time, the 90 days in relators case would expire on May 6, 1964, after which time a motion for an execution date may be applied for by the State prosecutor if no petition for certiorari had been submitted, or such petition had been submitted and denied by the United States Supreme Court.

However, on or about the 30th day of April, 1964, the New York State Court of Appeals, upon motion submitted by the prosecutor, ordered relator executed sometime during the week of June 8, 1964.

As this action must be done by service of a notice of [fol. 6] motion then the Court of Appeals and relators attorney, Mr. Schettino, were aware that the required time for filing certiorari had not yet expired.

Yet, this assigned attorney, who told relator that a petition for certiorari would be filed, has allowed the time for filing to expire, thereby causing an execution date to be set.

Also, relator asks that it be discovered how the prosecution knew that no application for certiorari would be made even before the 90 day period had expired.

Did attorney Schettino relay such information, knowing full well that he had told relator not to concern himself?

Does not the canon of legal ethics demand that the attorney should have informed relator that he would take no action before the required 90 day waiting period expired to enable relator to either apply for another attorney or submit a petition for writ of certiorari himself?

Is such action a showing of incompetence by this attorney, and if so, how competent was relators appeal handled in the New York Appeal Court?

As certiorari to the United States Supreme Court has been construed as part of a state court remedy (see: *Ex Parte Grotta*, 113 F.2d 574, *Robertson* v. *Skeen*, 117 F. Supp. 848) should not the New York Court of Appeals

have made inquiries as to why such an application was not filed, especially after that court had ordered a stay of execution solely for the submittion of such an application.

In another capital case *Coleman* v. *Denno*, decided 1-24-63 by the 2d Cir. Ct. of App., the question was presented as to whether the 14th Amendment was violated by the refusal of the New York Court of Appeals to assign counsel for purposes of preparing a petition for writ of certiorari.

While that was decided adversely toward Coleman, it is worthy of notice that volunteer attorney's prepared and submitted each and every petition put before the various courts. See: Opinion by U.S.D.J., Sidney Sugarman, 5-25-62, where a hearing was held and it was brought out [fol. 7] licensed attorneys had prepared and submitted all his petitions.

Here we have a different situation.

1. A stay of execution was granted that an application for a writ of certiorari could be submitted to the Supreme Court;

2. An attorney, who had worked on the appeal, reargument motion, and obtained a stay of execution, informed relator that he, the attorney, would submit the certiorari petition for relator;

3. No petition was submitted;

4. An execution date has been set;

5. Had this attorney told relator that he, the attorney, would not submit any certiorari petition, relator could have prepared same and sent it in pro se;

6. That unlike Coleman's case, relator has no services of counsel, voluntary or otherwise to help him prepare the present petition.

7. That the action's of the state and the attorney have worked to deprive relator of due process of law and equal protection of the laws in violation of the *14th Amendment to the Constitution.*

SEVENTH: That, relator has exhausted his state remedies (28 U.S.C. 2254) and although he has failed to apply for a writ of certiorari to the Supreme Court of the

United States, this Court has the power to here this application and order the execution of relator stayed.

This is one of the extra-ordinary cases where certiorari is not to be demanded before applying for relief in a U.S. District Court [*Fay* v. *Noia*, 372 U.S. 391] because now that his attorney has let the time expire wherein certiorari was to be applied for, and relator is scheduled to be executed sometime around June 8, 1964, and he does not know whom he must request a stay of execution from, plus the main fact that he is not at fault in the mixup that has occurred, a stay must be ordered by this Court.

Relator, cannot be made to suffer death because of failure of his attorney to follow through a proceeding that he said he would do and not only failed to proceed, but never even informed relator that he would not take any further action.

[fol. 8] The *14th Amendment* demands that a stay of execution order be issued that this matter may be looked into.

EIGHTH: That, such are the issues involved in this application that relator requests a hearing be held on whatever this honorable court deems worthy of such hearing and that somehow the Constitutional rights of your relator be granted the full protection of the United States Constitution.

NINTH: That, the judgment of the New York State Court of Appeals is illegal and void in that it affirmed the judgment of the Nassau County Court, which judgment was obtained in violation of relator's Constitutional rights.

WHEREFORE, relator, Theodore R. Stovall, prays that a writ of habeas corpus issue directed to Wilfred L. Denno, Warden, Sing Sing Prison, County of Westchester, State of New York, or whosoever has custody of the relator herein, commanding him to produce the body of the said Theodore R. Stovall, before this Court, on the ——— day of ———, 196—, at ——— o'clock in the ——— noon of said day, so that this Court may inquire into the legality of his detention.

DATED: the 6th day of May, 1964.

/s/ Theodore R. Stovall
Relator-pro se
354 Hunter Street
Ossining, New York

[*Duly sworn to by Theodore R. Stovall jurat omitted in printing (all in italics)*]

[fol. 9]

[Motion for leave to proceed in forma pauperis and affidavit in support—filed May 14, 1964 (omitted in printing)]

[fol. 11]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Civ 1505

THE UNITED STATES OF AMERICA, EX REL., THEODORE R. STOVALL, RELATOR

-against-

WILFRED L. DENNO, Warden, Sing Sing Prison, County of Westchester, State of New York, RESPONDENT

ORDER ALLOWING FILING IN FORMA PAUPERIS
—May 14, 1964

Upon reading the annexed affidavit of Theodore R. Stovall requesting that he be permitted to file his petition for writ of habeas corpus without prepayment of fees or costs or security therefor, and it appearing to the Court that this application should be granted, it is

ORDERED, that the filing thereof be and hereby is permitted without prepayment of fees or costs or security therefor, in accordance with Section 1915(a), Title 28, U.S.C., and it is further

ORDERED, that the petition for writ of habeas corpus be placed on the appropriate Motion Calendar.

Dated: May 14, 1964.

/s/ Wilfred Feinberg
U. S. D. J.

Copy Received May 14, 1964, U.S. Attorney So. Dist. of N. Y., Robert M. Morgenthau

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Civil 1505

[File Endorsement Omitted]

UNITED STATES EX REL., THEODORE STOVALL, PETITIONER

-against-

HONORABLE WILFRED L. DENNO, As Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT

MOTION TO AMEND THE PETITION FOR WRIT OF HABEAS CORPUS AND AFFIDAVIT—filed June 1, 1964

SIRS:

PLEASE TAKE NOTICE that (upon the annexed affidavit of Leon B. Polsky and the prior proceedings herein the undersigned will move this Court at Courtroom 318, United States Court House, Foley Square, New York, on the 1st day of June 1964 at ten-thirty o'clock in the forenoon or as soon thereafter as counsel may be heard for leave to amend the Petition for Writ of Habeas Corpus heretofore submitted.

Yours, etc.,

ANTHONY F. MARRA
The Legal Aid Society
Attorney for Petitioner
100 Centre Street
New York, New York 10013

TO:

HONORABLE WILLIAM CAHN
District Attorney
Nassau County
Old Country Road
Mineola, New York

[fol. 13]

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEON B. POLSKY, being duly sworn, deposes and says:

I am an attorney associated with Anthony F. Marra, assigned by the Honorable Wilfred Feinberg on May 20, 1964 to represent Theodore Stovall on his petition for writ of habeas corpus.

Your deponent has examined the printed volumes of the Record on Appeal to the Court of Appeals of the State of New York and has examined the briefs filed by the parties in that Court on Petitioner's appeal to that Court from a judgment convicting him of the crime of murder in the first degree and sentencing him to death by execution. I have also examined the Petition for a writ of habeas corpus prepared by Petitioner, *pro se*, and filed herein on May 14, 1964.

In his Petition, Mr. Stovall challenged the lawfulness of his arrest and the search incident thereto which uncovered evidence used against Petitioner at his trial on the grounds that, ". . . the use of evidence [illegally] taken from his home . . . was the cause of arrest and violated his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States." (Petition, p. 3).

After examination of the papers and records set forth above and based upon rulings at trial and rules of law more fully set forth in the accompanying Memorandum of Law, permission is requested to amend the Petition, pursuant to 28 U.S.C. § 2242, as follows:

[fol. 14] 1. Petitioner was denied his rights under the Fourth and Fourteenth Amendments of the Constitution of the United States by the ruling of the trial court that the "fruit of the poison tree" doctrine does not apply to the State of New York, thereby precluding further inquiry thereon; and further that the New York rule of law placing the burden upon a defendant to show lack of

probable cause is constitutionally erroneous; and, that these rulings deprived this Petitioner of a constitutionally adequate hearing and determination in and by the courts of New York on the merits of his claim of unreasonable search and seizure.

WHEREFORE, it is respectfully prayed that leave be granted to amend the Petition, as set forth above, and that the Writ of Habeas Corpus issue and be sustained unless Petitioner is retried within a reasonable time thereafter under an adequate standard.

/s/ Leon B. Polsky

Sworn to before me this 29 day of May, 1964.

/s/ Irene B. Parker
IRENE B. PARKER
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-3017500
Qualified in Queens County
Term Expires March 30, 1965

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civ. 1505

[File Endorsement Omitted]

UNITED STATES EX REL. THEODORE R. STOVALL,
PETITIONER

-against-

HONORABLE WILFRED DENNO, as Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT

APPEARANCES:

ANTHONY F. MARRA, ESQ.,
Attorney for Petitioner,
The Legal Aid Society,
100 Centre Street,
New York, New York 10013.

LEON B. POLSKY, ESQ.,
Of Counsel.

WILLIAM CAHN, ESQ.,
District Attorney of Nassau County,
County Court House,
Mineola, New York.
Attorney for Respondent.

HENRY P. DEVINE, ESQ.,
Assistant District Attorney,
Of Counsel.

OPINION—July 14, 1964

WYATT, District Judge,

This is an application for a writ of habeas corpus by Theodore R. Stovall confined in a prison of the State of New York under sentence of death after conviction for [fol. 16] murder in the first degree. The application is

made under 28 U.S.C. § 2241(c)(3) and is brought in forma pauperis under 28 U.S.C. § 1915(a). Anthony F. Marra, Esq., of The Legal Aid Society was assigned to represent relator and Leon B. Polsky, Esq., of The Legal Aid Society has been of counsel ably presenting the arguments for relator.

After trial before a jury in Nassau County Court, a verdict of guilty of that count in the indictment charging murder in the first degree was returned on June 8, 1962. There was a verdict of guilty on other counts of the indictment but this is without present significance.

The charge of murder in the first degree of which relator was found guilty was based on the stabbing to death of Dr. Paul Behrendt in the kitchen of his home in Garden City on the night of August 23-24, 1961.

Sentence of death was imposed on the first degree murder count on September 6, 1962.

Appeal was taken directly to the Court of Appeals where the judgment of conviction of murder in the first degree was unanimously affirmed on December 30, 1963 (13 N.Y. 2d 1094; 246 N.Y.S.2d 410).

On January 23, 1964, the remittitur was amended by the Court of Appeals to show that the Court had passed [fol. 17] on questions under the United States Constitution, including a contention that he was convicted on evidence obtained by unlawful search and seizure. The Court held that the constitutional rights of relator had not been violated (13 N.Y.2d 1178; 248 N.Y.S.2d 56).

The basis of the present application to this Court is that evidence was admitted at trial which was obtained as the result of an unlawful search and seizure. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). More specifically the claim is that in passing on the admissibility of the questioned evidence New York applied a "constitutionally impermissible standard" (Memorandum for Petitioner, p. 3) in two respects: (a) as to burden of proof, and (b) as to the "poison fruit" doctrine.

The only evidence to which the constitutional claim can relate is a white jacket (2041; parenthetical references are to folio numbers in the printed Record on Appeal to the Court of Appeals of New York), a pair of trousers (2494), and a hat (2505).

These articles were given to the arresting officers by a sister of the defendant at the time he was arrested in her apartment at 85 Wellington Road at Hempstead at about 4:15 in the afternoon of August 24, 1961 (144, 150, 152, [fol. 18] 159, 168, 169, 1281, 1380-81).

The theory of the defense at the trial as to these items was that they were the fruits of an illegal search and seizure by police officers in the rooms of defendant himself in Jamaica, Long Island (94, 147, 171, 1134-35, 1199, 2395-99).

It is established that police officers went to the rooms of defendant in Jamaica at about 3 o'clock in the afternoon of August 24, 1961 and there, without a search warrant, obtained a shirt, a pillow case, and a bed sheet (2395-99, 2414). The circumstances of this visit and the items obtained were not mentioned nor developed by the People, but by counsel for defendant. The articles obtained were actually marked as Defendant's Exhibits for Identification (1199, 1200, 2397-98).

It is also established that the articles obtained in Jamaica were taken to a Chinese laundry near by (the name of which was supplied by the landlord of defendant, 2424) and were found to have the same laundry mark as a shirt found at the scene of the crime (147, 518, 523, 662, 2417, 2424-26).

The theory of the defense was that the illegal search and seizure at Jamaica caused the police to arrest defendant, that the arrest was thus unlawful, and that [fol. 19] consequently the search and seizure which obtained the evidence (white jacket, pants, and hat) and which was incident to the arrest was an unlawful search and seizure.

For purposes of this decision, it will be assumed that the search in Jamaica was unlawful. The People so conceded, but there is a question whether the officers were not voluntarily admitted by the landlord of defendant and given the articles by him (641-45, 1875-78, 2396-99).

It is clear that the trial judge made an erroneous decision when he ruled in effect that *Mapp* v. *Ohio*, above, was not good law in New York (197, 711, 723).

This erroneous ruling did not, for several reasons, violate any constitutional rights of defendant.

The People offered in evidence nothing which was obtained in Jamaica. It was the defense which brought out the event and the articles obtained in Jamaica were marked as exhibits for identification by defendant. The District Attorney had said before any trial testimony was taken that he would offer no items obtained in Jamaica (125).

There was a source of information leading to the arrest of defendant, earlier and entirely independent of the Jamaica search.

This earlier and independent source was Walter Giro- [fol. 20] deau. He had been with Stovall in the evening before Dr. Behrendt was killed, had given Stovall his telephone number, and Stovall in a white jacket belonging to Dr. Behrendt had telephoned him from the Oasis Bar, near Dr. Behrendt's home (149, 172, 192, 503, 1836, 3210, 3387). The police went to the Oasis Bar about 8 in the morning of August 24 learned that a man had been in the Bar the evening before in a white jacket and made a telephone call, and then learned the telephone number which had been called by the man in the white jacket (149, 172, 1813, 1823, 1836, 1856, 3031, 3039, 3056). As one of the police put it: "That was our first break" (1836). The police at once called the telephone number, found it was the telephone of Girodeau, and got from him the name of defendant as well as the address of the sister of defendant in Hempstead, where the arrest was made (1839, 1840, 1856, 1859, 3214-15, 3280, 3389). This was before 9 o'clock of the morning of August 24 (1813, 1856, 3214, 3389-90) or about six hours before the search at Jamaica at 3 o'clock in the afternoon (2414).

The authorities seem clear that where there is a source of information leading to an arrest, which information is independent of information obtained from an unlawful search and seizure, then the arrest is lawful. *Wong Sun* [fol. 21] v. *United States*, 371 U.S. 471 (1963); *Costello* v. *United States*, 365 U.S. 265 (1961); *Nardone* v. *United States*, 308 U.S. 338 (1939); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). These cases were cited to the Court of Appeals of New York to sustain the conviction (People's Brief, p. 44).

Finally—and apart from the arrest of Stovall—there was no search and seizure to secure the articles offered by the People in evidence. The proof is convincing that the articles were voluntarily turned over to the police by the sister of Stovall (157, 168, 169, 1281) and, of course, it was in her apartment that Stovall was arrested.

Whatever standards New York may have applied and however mistaken the trial judge may have been as to the reach of *Mapp* v. *Ohio*, the record establishes that no constitutional rights of defendant were violated.

The Court takes occasion to express thanks to Anthony F. Marra, Esq., and Leon B. Polsky, Esq., for their able services in representing the petitioner.

The application for a writ of habeas corpus is denied.

SO ORDERED.

Dated: New York, New York
July 14, 1964

/s/ INZER B. WYATT
United States District Judge

[fol. 22]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket # 29208

[File Endorsement Omitted]

UNITED STATES OF AMERICA EX REL., THEODORE STOVALL, RELATOR-APPELLANT

-against-

HON. WILFRED L. DENNO, As Warden of Sing Sing State Prison, Ossining, New York, RESPONDENT-APPELLEE

APPENDIX FOR RELATOR-APPELLANT—filed December 4, 1964

[fol. 23]

IN THE DISTRICT COURT OF THE COUNTY OF NASSAU STATE OF NEW YORK: FIRST DISTRICT

Index No. Fel. 685/1961

THE PEOPLE OF THE STATE OF NEW YORK

-against-

THEODORE R. STOVALL, DEFENDANT

MINUTES OF ARRAIGNMENT—August 25, 1961

Held before the Honorable Benjamin Zipper, District Court Judge, at the First District Court, Arraignment Part, Mineola, New York, on August 25, 1961.

VIOLATION: Section 1044-1 Penal Law.

APPEARANCES:

ARTHUR RANDALL, ESQ.,
Assistant District Attorney,
Nassau County, New York,
For the People

Defendant in person.

Reported by
ALVIN ABRAMSON,
District Court Stenographer

[fol. 24] THE COURT: Are you Theodore R. Stovall?

THE DEFENDANT: Yes.

THE COURT: Is that the way you pronounce your name?

THE DEFENDANT: Yes.

THE COURT: Do you live at 111-10 145th Street, Jamaica?

THE DEFENDANT: Yes.

THE COURT: You're charged by Robert Rofheart, Shield 66, as follows: "that he is a detective attached to the Homicide Bureau, Nassau County Police Department,

and that on the 24th day of August, 1961, at 70 Pine Street, Garden City, New York, in the County of Nassau, the defendant did wilfully, wrongfully and unlawfully violate the provisions of Section 1044 subdivision 1. of the Penal Law of the State of New York, in that at the time and place aforesaid, the defendant, Theodore R. Stovall, did wilfully, feloniously and of malice afore-thought, and with a deliberate and premeditated design to effect the death of Paul Behrendt, struck, stabbed [3] and killed Paul Behrendt with a knife. Wherefore he prays that the said Theodore R. Stovall may be arrested and dealt with in the premises according to law." Subscribed and sworn to before me today by Robert Rofheart.

The charge against you is violating Section 1044 sub- [fol. 25] division 1 of the Penal Law of the State of New York, which is murder in the first degree. You have the right to the aid of a lawyer or counsel in every stage of the proceeding and before any further proceedings are had. Do you want to get a lawyer? If you do, I'll give you time to get one before we proceed at this particular time.

THE DEFENDANT: Yes, sir.

THE COURT: Now, I wish to advise that—you're getting your own lawyer; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: All right, I'll put it over to August 31st, next Thursday, for the purpose of getting an attorney. The defendant [4] is remanded pending further pleading.

That's all.

(Whereupon, the arraignment of Theodore R. Stovall was adjourned to August 31, 1961.)

[Stenographer's Certificate to foregoing transcript omitted in printing]

[fol. 27]

IN THE DISTRICT COURT OF THE COUNTY OF NASSAU STATE OF NEW YORK: FIRST DISTRICT

Index No. Fel 685/1961

THE PEOPLE OF THE STATE OF NEW YORK

against

THEODORE R. STOVALL, DEFENDANT

MINUTES OF ARRAIGNMENT—August 31, 1961

BEFORE: HON. HAROLD F. STROHSON,
District Court Judge

* * * *

Charge: Vio. Sec. 1044 P.L.

ANTHONY CAVALLO
Official Court Steno.

[fol. 28] [2]THE COURT: People against Theodore R. Stovall.

Are you Theodore R. Stovall?

MR. STOVALL: Yes, I am.

THE COURT: You were advised that you were given time until today, August 31, to return here with a lawyer. Have you obtained counsel?

MR. STOVALL: I have requested for one, sir.

THE COURT: You have requested. Who did you request?

MR. STOVALL: I requested the jailhouse where I was at for a lawyer.

THE COURT: Well, did you get in touch with any of your relatives to see if they would get counsel for you, or a lawyer for you?

MR. STOVALL: No, I didn't

THE COURT: Well then, what were you advised over in the jail?

MR. STOVALL: They said I would get one. They told me to write a letter to the warden and he said I would be assigned to a lawyer.

THE COURT: Well, you see, this Court [3] cannot assign a lawyer to you. We have no power to do that. The only Court that can do this is the County Court. [fol. 29] The County Court has the power to assign counsel, and of course they can't do it until you are in that Court.

Now, you have certain rights in this Court. The first of which is the right to the aid of a lawyer. Now, if you have no lawyer, then the next step is that you have a right to demand and examination or waive an examination. If you waive the examination of the charge against you, you you will be referred to the Grand Jury and at that time, if, as and when you are indicated, the County Court will assign a lawyer to you for your defense.

Counsel George Mulry, would you be willing to help this man protect his rights in this Court at this time?

MR. MULRY: In this court I will.

THE COURT: That's what I mean. Would you like to take him out and confer with him, or do you want to sit down at the table there and explain to him?

[4] MR. MULRY: I could explain right at the table.

THE COURT: Sit down with this lawyer, Mr. Stovall. He is a lawyer who will volunteer his services to help you now, protect your rights.

[fol. 30] (After a short recess between Mr. Mulry and Mr. Stovall, the arraignment continued.)

THE COURT: Are ywe ready with Stovall?

MR. MULRY: Yes. Your Honor, I have a copy of the charge before me and I have read it, so we waive the reading of it, but Mr. Stovall demands a hearing in this Court.

THE COURT: Well, I guess the charge has already been read to him. When do you want to set the date?

MR. MULRY: I would like to make it tomorrow

THE COURT: September 1st at 2:00 P.M.

MR. MULRY: Yes.

THE COURT: You understand what is happening Mr. Stovall, don't you.

MR. MULRY: I explained it to him.

THE COURT: You understand what we are [5] doing?

MR. STOVALL: I understand.

THE COURT: That you are taking for an examination so you could be confronted with the witness and the judge could decide whether or not there has been a crime committed here.

MR. STOVALL: Yes.

THE COURT: All right, September 1st for examination.

* * * *

[fol. 31]

[Stenographer's Certificate to foregoing transcript omitted in printing]

[fol. 32]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 307—September Term, 1964.

Argued January 21, 1965

Docket No. 29208

UNITED STATES EX REL. THEODORE R. STOVALL,
APPELLANT

v.

HONORABLE WILFRED DENNO, as Warden of Sing Sing Prison, Ossining, New York, APPELLEE

Before:

MOORE, FRIENDLY and MARSHALL,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, denying an application by a state prisoner for a writ of *habeas corpus*. Reversed.

LEON B. POLSKY (Anthony F. Marra, The Legal Aid Society, New York, N. Y.), *for Appellant.*

HENRY P. DEVINE, Assistant District Attorney (William Cahn, District Attorney, Nassau County), *for Appellee.*

[fol. 33] OPINION—March 31, 1965

FRIENDLY, *Circuit Judge*:

Theodore Stovall, under sentence of death for the brutal murder of Dr. Paul Behrendt in Nassau County, N. Y., appeals from Judge Wyatt's denial of an application in

the District Court for the Southern District of New York, for a writ of *habeas corpus*. The judge granted a certificate of probable cause, 28 U. S. C. § 2253, and leave to appeal *in forma pauperis*, 28 U. S. C. § 1915(a), and reassigned the Legal Aid Society to represent Stovall on appeal, 28 U. S. C. § 1915(d).

We wish to make clear at the outset that the ground which was principally argued to us and on which we are constrained to reverse, although raised in Stovall's handwritten petition in the district court, was not argued to and consequently was not discussed by Judge Wyatt, counsel having relied on a quite different point mentioned at the end of this opinion. We do not at all approve this method of presentation. But since the case is a capital one, and the relevant facts are sufficiently revealed in the state court record, we shall dispose of the appeal on the merits—as, indeed, the Assistant District Attorney has commendably requested.

Late on the night of August 23-24, 1961, Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island. His wife, Dr. Frances Behrendt, vainly coming to his assistance, was greviously wounded. The police, who quickly arrived on the scene as the result of a telephone call for medical aid which Mrs. Behrendt had managed to make, found many pieces of telltale evidence. They discovered a key chain with three keys, one of which was to Stovall's locker in a Brooklyn store where he worked. They also found a bloody shirt with the identification tag of a laundry used by Stovall. Further investigation in the morning of August 24 led [fol. 34] the police to a bar which Stovall had visited the previous night. This, in turn, brought them to a man whom Stovall had called by telephone from the bar; he supplied Stovall's name and the address of Stovall's sister in Hempstead, Long Island. Proceeding to this address around 4 P.M., the police found Stovall and also Dr. Behrendt's blood-stained white coat. They arrested him and seized the coat, a pair of trousers owned by Stovall which were stained with blood of Mrs. Behrendt's blood type, and his pork-pie hat. The shirt left in the Behrendt kitchen was similarly stained, but a piece torn from it,

found under Dr. Behrendt's armpit, was colored with blood of the Doctor's type. At the trial Stovall's sister and a man who was living with her testified to Stovall's appearance at her room in Hempstead around 12:30 A.M. on the morning of August 24, without the white shirt he had been wearing earlier that evening but with the white jacket and with bloody pants and a smear of blood on his forehead. Mrs. Behrendt identified Stovall at the trial.

With all this identification evidence—and there was a good deal more—it may be wondered what justification can exist for federal interposition. The answer lies in an episode we shall now recount.

On the evening of August 24, Stovall was questioned by the prosecutor at police headquarters; the statement was almost wholly exculpatory. The next morning he was arraigned, on a detective's charge of first degree murder, before a state district court judge. The judge informed Stovall, as required by § 188 of the New York Code of Criminal Procedure, "You have the right to the aid of a lawyer or counsel in every stage of the proceedings and before any further proceedings are had"; asked, "Do you want to get a lawyer?"; and said, "If you do, I'll give you time to get one before we proceed at this particular time." Stovall answered that he did, and on the judge's further [fol. 35] inquiry, "you're getting your own lawyer; is that right?", responded in the affirmative. The judge then announced that he would "put it over to August 31st, next Thursday, for the purpose of getting an attorney," and directed that Stovall be "remanded pending further pleading."

Section 192 of New York's Code of Criminal Procedure prescribes, so far as here pertinent, that "If an adjournment be had for any cause, the magistrate must commit the defendant for examination." [1] and § 193 adds that the commitment shall be to the sheriff, save in New York City where it is to be to the commissioner of correction. We were told at the argument that the sheriff of Nassau

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[1] Of course, this means *pending* examination of the charge by the magistrate—not examination *of* the defendant.

County does not have a representative available in the arraigning courts and that responsibility for placing committed defendants in his hands rests with the police. After the arraignment but apparently before Stovall was handed over to the sheriff, two detectives took him, handcuffed to one of them, to the hospital where Mrs. Behrendt had undergone extensive surgery, and into her room.—Three high police officers and two prosecutors were also there. One of the police officers asked Mrs. Behrendt whether Stovall was "the man"; she said he was. At some time one of the officers asked Stovall "to say a few words for voice identification"; he did—just what does not appear.

In opening the case at trial the prosecutor said, outlining the People's evidence:

> "There will be further evidence that Mrs. Behrendt observed this defendant while she was in the hospital and the defendant was taken to her. She identified him. I don't believe that she has ever seen him since, and whether she will be able to identify him here in [fol. 36] court I do not know at this time. But she will be called and, gentlemen, in short there will be other evidence that will be produced for your consideration."

Defense counsel made no objection or request for a mistrial. When the two detectives were called, before Mrs. Behrendt was asked to testify, defense counsel cross-examined them as to the hospital identification, bringing out, among other things, that the police chiefs and the prosecutors had been with Mrs. Behrendt before Stovall entered in handcuffs, that there was no line-up, and that Stovall was the only Negro in the room. In the course of her testimony Mrs. Behrendt identified Stovall in court and, without objection, stated she had also seen him in the hospital. N. Y. Code of Criminal Procedure § 393-b.

Stovall contends that use of the hospital identification constituted a denial of his right to counsel and a violation of the privilege against self-incrimination, guaranteed respectively by the Sixth and Fifth Amendments, now held to have been made applicable to the states by the Four-

teenth, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and also that the procedure employed at the hospital so prejudiced the identification that its use violated the due process clause of the Fourteenth Amendment. We need deal only with the first contention.

New York does not dispute that Stovall's constitutional right to counsel had come into being when he was brought before a judge for arraignment. *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *White* v. *Maryland*, 373 U. S. 59 (1963). The judge's belief that Stovall was obtaining counsel of his own choosing was understandable, even though, at the adjourned hearing, it turned out that Stovall was without means and wished counsel to be assigned. But a prospect of counsel is not the same as having one, and once the right was attached and has not [fol. 37] been waived, there are means—interrogation being the most obvious—from which, in the absence of waiver, the state no longer can gain incriminating evidence without notice to him, whatever the situation in the "investigatorial" stage. Consistent with this constitutional requirement, New York Code of Criminal Procedure directs that after informing the defendant of "his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had," § 188, the magistrate must "allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose," and, upon defendant's request, must send a peace officer to take a message to counsel, § 189. Here, without awaiting the presence of counsel, New York caused Stovall to be brought before Mrs. Behrendt for identification, and then used that testimony to his detriment at the trial.

The State's first answer is that testimony concerning the hospital identification was initially brought out by the defense in cross-examination, and that at no time did it object to disclosure of the incident to the jury. Normally there could be no valid claim of error if a defendant presented evidence which he could bar and the State followed with a then harmless repetition. However, the prosecutor had unequivocally announced at the start of the trial that Mrs. Behrendt would testify to her earlier

identification; in this context, defense counsel's attempt to discredit such evidence in advance, while the detectives were available for cross-examination, rather than having to recall them, cannot fairly be deemed an independent attempt to introduce the identification as part of Stovall's case. The failure to object to the State's announced intention to offer the hospital identification is more troublesome. Although a mistrial could have been sought when the prosecutor first mentioned this in his opening, it would be going too far to insist on so instantaneous [fol. 38] a reaction, with the risk of dramatizing the incident to the jury if the request were denied. But there was time for defense counsel to seek an exclusionary ruling, outside the presence of the jury, before the detectives took the stand. While we see no real excuse for this omission, we doubt that the Supreme Court would permit so demanding a standard in a capital case.[2]

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[2] We have had some concern whether any New York court has ever had an opportunity to consider the objection as to Mrs. Behrendt's identification. Point IV of Stovall's brief in the New York Court of Appeals deals with the hospital identification; in the course of this, it was argued (p. 37) that "What transpired at the hospital was after the defendant had been arraigned, while the defendant was under arrest and while the defendant was without counsel," citing *People* v. *Meyer*, 11 N. Y. 2d 162, 227 N. Y. S. 2d 427 (1962), and *People* v. *Rodriguez*, 11 N. Y. 2d 279, 229 N. Y. S. 2d 353 (1962). The People's brief said in answer (p. 48) only that the testimony complained of was elicited at the trial in cross-examination of one of the detectives. After affirming the conviction on the first degree murder count, 13 N. Y. 2d 1094, 246 N. Y. S. 2d 410 (1963), the Court of Appeals amended its remittitur to state that there were presented, and it had necessarily passed upon, various questions under the Federal Constitution, including appellant's contention "that his rights under the Fifth Amendment of the Constitution of the United States were violated in that appellant was compelled to testify against himself after arraignment." 13 N. Y. 2d 1178, 248 N. Y. S. 2d 56, 57 (1964). In the light of Stovall's brief in the Court of Appeals and the cases there cited, this can be charitably read as including the Sixth Amendment contention as to the same episode. If, on the other hand, it be thought that Stovall never did raise the Sixth Amendment claim in the New York courts, and if we should assume that he would be required now to present this by an available state method, there appears to be no way in which he can raise it now, see *People* v.

The State also argues that the lack of counsel worked no prejudice since the hospital "show up" did not amount to self-incrimination and therefore counsel could not have prevented it. Quite apart from whether the privilege against self-incrimination covers evidence obtained outside the courtroom and later sought to be introduced, see [fol. 39] 8 Wigmore, Evidence § 2252, at 328 & n. 27 (McNaughton rev. 1961), it is usually said that the privilege does not invest a defendant with immunity from exposing himself to identification, even if this includes some movement, such as going from the jail to the courtroom for trial or rising, if called upon, see *People* v. *Gardner*, 144 N. Y. 119, 127-30 (1894); 8 Wigmore, *supra*, § 2265; Maguire, Evidence of Guilt § 2.04 at 25-33 (1959); and it may well be argued that use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently than that of the arm muscles. See *Holt* v. *United States*, 218 U. S. 245, 252 (1910); 8 Wigmore, *supra*, § 2265 at 396 & n. 9. The bulk of decisions on this subject deal with what testimony can be given when the defendant has taken the action directed or what comment can be made when he has refused to take it—not with what counsel can do to prevent the issue from arising or, if unsuccessful in that, to see to it that the episode takes place in the most benign form. Mr. Justice Holmes made this distinction in the *Holt* case, where the defendant, a soldier under arrest, had put on a blouse on the order of officers constituting a board of investigation, and testimony that it fitted was introduced at the trial: "Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent, *Adams* v. *New York*, 192 U. S. 585," 218 U. S. at 253.[3]

Howard, 12 N. Y. 2d 65, 236 N. Y. S. 2d 39 (1962), cert. denied, 374 U. S. 840 (1963), and *Fay* v. *Noia*, 372 U. S. 391, 434-35, 438-40 (1963), would seem applicable.

[3] The *Holt* decision antedated the development, in *Weeks* v. *United States*, 232 U. S. 383 (1914), of the federal law as to use of illegally obtained evidence. See the comment on *Adams* v. *New York* in the *Weeks* opinion, 232 U. S. at 394-96.

The question whether the lack of counsel was prejudicial to Stovall does not turn on whether forbidden self-[fol. 40] incrimination occurred. Assuming that the trip involved no such violation, there were still many things that counsel might have done. He might have persuaded the prosecutor, in the state's own interest, if not to forgo the hospital identification, at least to assure conditions better designed to avoid suggestion. He might have persuaded the judge to direct that Stovall be immediately sent to and then kept in jail pending trial, or be put before Mrs. Behrendt only under fair conditions such as a line-up, or be accompanied by counsel who might question her. See *Commonwealth* v. *Brines*, 29 Pa. Dist. 1091 (C. P. 1920). Or, as a last resort, he might have advised Stovall to refuse to go, or to remain silent if taken by force. Granting all this, it remains true that the chance that counsel's presence would have altered events is considerably less here than in the case of voluntary confessions, where a lawyer's advice can almost insure that none would be forthcoming. Nevertheless, Stovall's transportation to the hospital, his modicum of cooperation in the visit and the nature of the identification procedure, each would have offered counsel an opportunity to intervene; taking them all together, in the context of a capital case, we cannot say his probability of success was so slight that the lack of counsel was harmless.[4] Even if Mrs. Behrendt's condition had been such as to make it imperative that Stovall be taken to the hospital when and as he was, which the record does not indicate, there was no similar compulsion on the [fol. 41] prosecutor to use the evidence against Stovall, and we think the Sixth Amendment precluded this.

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[4] Our illustrations of what counsel might have done carry no implications whether denial of any such requests would have violated Stovall's federally protected rights. Prejudice exists if lack of counsel resulted in the loss of rights that the state might well have accorded. See *Tomkins* v. *Missouri*, 323 U. S. 485, 489 (1945). We must await further enlightenment whether, once the right to counsel has attached, all further investigational activity involving some cooperation by the defendant must be with counsel's consent or at least on notice to him.

Even with our incomplete statement of the massive evidence showing Stovall to have been the killer of Dr. Behrendt, it would be naive not to recognize that the episode of the hospital identification has been overblown to a significance out of all proportion to anything it could have had at the trial. Indeed, at the argument in this court, counsel for Stovall stated, with complete frankness, that at a new trial the defense primarily relied on would be insanity—an issue which was raised and necessarily found against him at the first trial and on which the hospital identification had no bearing. A blunder by the prosecutor in offering the evidence, which had no probable causal relation in the verdict, is thus to result in a new trial on the defense of insanity which Stovall has already had a fair opportunity to establish.[5] We do not find our role in bringing this about a particularly congenial one. But the only principle upon which the relative unimportance of the hospital identification could justify denial of the writ would be the doctrine of harmless error, applied in *United States* v. *Guerra*, 334 F. 2d 138, 144-47 (2 Cir.), cert. denied, 379 U. S. 936 (1964). Here, in contrast to that case, where the unlawfully obtained statement was "an abortive attempt to impeach" the defendant "on a minor issue," the statement was inculpatory on the central question of his presence on the occasion of the crime; indeed, Mrs. Behrendt's was the only identification that was testimonial rather than circum-
[fol. 42] stantial,[6] and the jury asked that all her testimony be reread. A claim of harmless error as to a conviction must surmount an exceedingly high hurdle, even on collateral attack, when the error was constitutional and the punishment is death. See *Bruno* v. *United States*, 308 U. S. 287 (1939); *Kotteakos* v. *United States*, 328 U. S. 750, 764-65 (1946); *Stewart* v.

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[5] Stovall in fact made little effort to show insanity, the pertinent evidence coming chiefly from the State; but it remains true that a wholly unrelated error now gives Stovall a fresh chance to present a defense otherwise foreclosed.

[6] The case vividly illustrates how much *more* probative a multiple strand of circumstantial evidence may be than a testimonial identification. See 1 Wigmore, Evidence § 26 (3d ed. 1940).

United States, 366 U. S. 1, 9-10 (1961); *Hamilton* v. *Alabama*, *supra*, 368 U. S. 52. The hurdle is too high for this case.[7]

In view of this ruling, a brief word on the constitutional point argued to the district judge will suffice. Around 3 P.M. on the afternoon of August 24 police officers, without a search warrant, obtained access to Stovall's own rooms in Jamaica, Long Island, and seized a shirt, a pillow case, and a bed sheet, which had the same laundry marks as the shirt left in Dr. Behrendt's kitchen. Before and during the trial, defense counsel sought a hearing whether these objects, not offered by the People, had led to the seizure of articles of clothing attendant [fol. 43] on Stovall's arrest. The trial judge denied such a hearing, erroneously, see *Wong Sun* v. *United States*, 371 U. S. 471, 484-88 (1963), on the basis that the principle of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), did not extend to fruits of an unlawful search. Judge Wyatt nevertheless overruled the objection since, as he found, "There was a source of information," to wit, the man to whom Stovall had telephoned from the bar, "leading to the arrest of defendant, earlier and entirely independent of the Jamaica search." Not challenging this finding, counsel contends that Stovall was nevertheless prejudiced since a New York judge might have found differently or have

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[7] As a constitutional matter, there is no obvious reason why a new trial need be held on an issue "distinct and separable" from that vitiated by improper evidence or instructions, see *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U. S. 494, 500 (1931); and if New York law permitted a new trial on the issue of commission excluding insanity, which we seriously doubt, cf. Code of Criminal Procedure, §§ 464, 544, we see no reason why that would not meet federal requirements. Compare *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 245-46 (1957); *Jackson* v. *Denno*, 378 U. S. 368, 395-96 (1964). New York has recently provided that a conviction of first degree murder be followed by further evidence and deliberation by the jury to fix the penalty, and the New York statute provides that error in the latter phase has no effect upon the conviction. N. Y. Penal Law § 1045-a. California now requires that the insanity defense be considered by the jury in murder cases after it has in turn convicted and fixed sentence, but the statute does not speak to the question of partial new trials as between commission and insanity. Cal. Penal Code §§ 190.1, 1026.

been satisfied with a smaller infiltration of poisoned sap, and also because, for reasons not apparent to counsel or to us, Stovall's attorneys in the state trial reacted to the erroneous ruling by themselves displaying to the jury the results of the Jamaica search. We find it unnecessary to resolve these contentions, since we are confident that at a new trial a proper preliminary hearing will be had.

The denial of *habeas corpus* is reversed, with instructions that the writ issue unless, within a reasonable time, New York affords Stovall a new trial.

MOORE, *Circuit Judge* (dissenting):

Dr. Frances Behrendt concededly (by the majority) greviously wounded was in a hospital where she had undergone extensive surgery. Her husband, Dr. Paul Behrendt, had been killed. The defendant was arraigned on August 25, 1961 and, having requested an opportunity to get his own lawyer, the court without proceeding further postponed the case to August 31st. The only person in the world who could exonerate Stovall and save him from possible execution was Dr. Frances Behrendt. Her [fol. 44] words, "He is not the man" could have meant life or death to Stovall. Stovall could wait for six days to retain a lawyer. Whether Dr. Frances Behrendt could wait even six hours was conjectural. No amout of subsequent skillful legal advice could replace the need for action while she yet lived—action which required Stovall's immediate presence in the hospital room.

Every defendant in a criminal case is subjected to identification. Even while he is presumed to be innocent, in the presence of the jury he is called the defendant. If the crime was of a violent nature, one or more police officers are present. He rises for identification purposes or a witness places a hand on his shoulder to indicate the person concerning whom testimony is being given.

The majority characterize the prosecutor's action as a "blunder." I wonder what word they would have used, assuming that Dr. Behrendt had died later that day, had the police immediately lodged Stovall in jail and failed to

take him to her room while there was still time. It is too easy after the event for appellate courts to conjure up all the might-have-been possibilities and the hypothetical steps and maneuvers an attorney might have taken.

I find no error in the identification procedure or the way it was used upon the trial and, hence, would affirm the denial of the writ.

[fol. 45] IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * * *

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA, EX REL.

THEODORE STOVALL, RELATOR-APPELLANT

v.

WILFRED L. DENNO, As Warden of Sing Sing Prison, Ossining, New York, RESPONDENT-APPELLEE

JUDGMENT—March 31, 1965

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

Further ordered, adjudged and decreed that the writ of habeas corpus shall issue unless, within a reasonable time, the State of New York affords appellant a new trial.

A. DANIEL FUSARO
Clerk

[fol. 46]

[File Endorsement Omitted]

[fol. 47] IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 307—September Term, 1964

Argued January 21, 1965

Submitted *en banc* to this Court on May 26, 1965

* * * * * *

Docket No. 29208

UNITED STATES EX REL. THEODORE R. STOVALL,
APPELLANT

—against—

HONORABLE WILFRED DENNO, as Warden of
Sing Sing Prison, Ossining, New York, APPELLEE

Before:

LUMBARD, *Chief Judge*,
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS and ANDERSON, *Circuit Judges*

Appeal from an order of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, denying an application by a state prisoner for a writ of habeas corpus. Affirmed.

LEON B. POLSKY (Anthony F. Marra, The Legal Aid Society, New York, N. Y.), *for Appellant.*

[fol. 48] HENRY P. DEVINE, Assistant District Attorney (William Cahn, District Attorney, Nassau County, State of New York), *for Appellee.*

OPINION—January 31, 1966

MOORE, *Circuit Judge* (with whom Judges Kaufman, Hays and Anderson concur; Judge Lumbard concurs in a

separate opinion with whom Judge Kaufman also concurs; Judge Friendly dissents in a separate opinion with whom Judge Waterman concurs; and Judge Smith dissents in a separate opinion):

Theodore Roosevelt Stovall appeals from an order dismissing a writ of habeas corpus. The appeal was argued originally before a panel of this Court (Moore, Friendly and Marshall, *C.JJ.*), and an opinion was filed on March 31, 1965, reversing the order of the District Court, Moore, *C.J.*, dissenting. Thereafter, this Court, *sua sponte* on May 26, 1965, ordered *en banc* consideration of this case and six other cases. Upon such consideration, the order appealed from is affirmed.

Late on the night of August 23-24, 1961, Dr. Paul Behrendt was stabbed to death in the kitchen of his home in Garden City, Long Island. His wife, Dr. Frances Behrendt, vainly coming to his assistance, was grievously wounded. The police, who quickly arrived on the scene as the result of a telephone call for medical aid which Mrs. Behrendt had managed to make, found many pieces of telltale evidence. They discovered a key chain with three keys, one of which was to Stovall's locker in a Brooklyn store where he worked. They also found a bloody shirt with the identification tag of a laundry used by Stovall. Further investigation in the morning of August 24th led the police to a bar which Stovall had visited the previous [fol. 49] night. This, in turn, brought them to a man whom Stovall had called by telephone from the bar; he supplied Stovall's name and the address of Stovall's sister in Hempstead, Long Island. Proceeding to this address around 4:00 P.M., the police found Stovall and also Dr. Behrendt's blood-stained white coat. They arrested him and seized the coat, a pair of trousers owned by Stovall which were stained with blood of Mrs. Behrendt's blood type, and his pork-pie hat. The shirt left in the Behrendt kitchen was similarly stained, but a piece torn from it, found under Dr. Behrendt's armpit, was colored with blood of the Doctor's type. At the trial, Stovall's sister and a male friend of the sister testified that when Stovall came to her room in Hempstead at about 12:30 A.M., August 24th, he was not wearing the white shirt he had

on earlier but instead appeared with the white jacket, bloody pants and a smear of blood on his forehead.

On the evening of August 24th, Stovall was questioned by the prosecutor at police headquarters; the statement was almost wholly exculpatory. The next morning he was arraigned, on a detective's charge of first degree murder, before a state district court judge. The judge informed Stovall, as required by § 188 of the New York Code of Criminal Procedure, "You have the right to the aid of a lawyer or counsel in every stage of the proceedings and before any further proceedings are had"; he then asked, "Do you want to get a lawyer?"; and said, "If you do, I'll give you time to get one before we proceed at this particular time." Stovall answered that he did, and on the Judge's further inquiry, "you're getting your own lawyer; is that right?", responded in the affirmative. The Judge then announced that he would "put it over to August 31st, next Thursday, for the purpose of getting an attorney," [fol. 50] and directed that Stovall be "remanded pending further pleading."

Since Stovall had to remain in police custody pending further proceedings on the adjourned date, he was taken for identification purposes to Mrs. Behrendt's hospital room where Mrs. Behrendt identified Stovall as her attacker. Thereafter he was lodged in jail. Stovall was convicted by the jury of murder in the first degree. The jury did not recommend leniency. Stovall was, therefore, sentenced to death.

The principal point now urged on appeal is the claim (not even presented to the court below) that the taking of Stovall to Mrs. Behrendt's hospital room for possible identification violated his Fifth, Sixth and Fourteenth Amendment rights. No claim is made—nor could any be sustained by the proof—that Stovall's arrest was without probable cause or that there was any delay in his arraignment which occurred the morning following his arrest.

Nor is any claim made that Stovall at any time made a confession or gave any statements which were obtained by coercion, trickery or subterfuge—in fact there were no statements or confessions whatsoever. Thus, the only issue upon this appeal is: can the police, following an arraign-

ment at which the person arraigned advised the court that he was going to get his own lawyer, continue their identification efforts by taking such person to the hospital room of the victim to ascertain whether or not she recognized him as her attacker? Obviously the victim of the crime, if he or she has had an opportunity to see the attacker at the time of the attack, is the person most likely to be able to confirm or refute the identity of the person arrested. Freedom or further detention may well come from a "yes" or "no" to the simple question: is this the man who attacked you?

[fol. 51]

Fifth Amendment

(Self-Incrimination)

Appellant challenges the admissibility in evidence of Mrs. Behrendt's hospital room identification. However, under section 393b, New York Code of Criminal Procedure, "a witness who has on a previous occasion identified such person may testify to such previous identification."

What was Stovall's status at the time he was taken to Mrs. Behrendt's hospital room? Because of appellant's present argument, the spotlight of inquiry must be focused sharply upon this single period of time. Stovall had just been arraigned and had advised the court that he wished to obtain his own counsel rather than accept court-appointed counsel. To give him adequate opportunity to do so, the court adjourned "any further proceedings" for six days for that purpose. No plea was entered, no motions had to be made or waived, no rights were jeopardized. In the meantime Stovall had to remain in the custody of the police. This was lawful custody. To fulfill properly their duty to make sure that they had the right man, it was incumbent upon the police to have the victim of the assault view the suspected attacker to identify or disavow him as the culprit.

Had Mrs. Behrendt not been so seriously injured and hospitalized, Stovall would have been lodged in the local jail and Mrs. Behrendt could have veiwed him in a line-up or looked at him through the door or gate of his cell. A

photograph of Stovall might have been taken and exhibited to her. However, the police have to deal with situations as they find them and act expeditiously in the light of emergencies which confront them. Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, "He is not the man" [fol. 52] could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible proeedure and took Stovall to the hospital room.[1] Under these circumstances, the usual police station line-up, which Stovall now argues he should have had, was out of the question.

The hospital room identification [2] was not prejudicial to Stovall because Mrs. Behrendt, after she recovered, made positive identification in the courtroom. There is no evidence that her hospital room identification on August 25, 1961, affected or influenced in any way her courtroom identification on May 23, 1962. Any previous identification was but duplicative. She was the only living person who had seen her attacker. Stovall's counsel used his right of cross-examination to the fullest extent in questioning the identification and dwelt upon it in summation. Since the law requires the defendant to be present upon his trial and to exhibit his face for identification purposes, it was for the jury to weigh the accuracy of Mrs. Behrendt's identification.

As a matter of law, the method of identification inside or outside the courtroom would go to the weight to be attributed to the identification; not to the admissibility or

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[1] Undoubtedly, if the police had failed to take Stovall to the hospital and had lodged him immediately in jail and Mrs. Behrendt had died, some appellate counsel would now be urging the same acts as a ground for reversal, asserting that he had thus been deprived of a constitutional right.

[2] Voice identification was requested and Stovall complied but this form of identification was not used or referred to in the trial and, hence, is not an issue here.

constitutionality of testimony relating thereto, *People* v. *Partram*, 60 Cal. 2d 378, 384 P. 2d 1001 (1963), *cert.* [fol. 53] *denied*, 377 U.S. 945 (1964), (defendant forced to try on hat and coat which did not fit others in line-up); *People* v. *Clark*, 28 Ill. 2d 423, 192 N. E. 2d 851 (1963), (witness saw one of suspects in police station before line-up); *People* v. *Boney*, 28 Ill. 2d 505, 192 N. E. 2d 920 (1963), (wife raped; husband knew four of five in line-up were from State's Attorney office); *State* v. *Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *Redmen* v. *Commonwealth*, 321 S. W. 2d 397 (Ky. 1959), (claim that police pointed out suspect before line-up); *Commonwealth* v. *Downer*, 159 Pa. Super. 626, 49A 2d 516 (1946), (defendant alone shown to witness), although there are some decisions to the contrary, *People* v. *Conley*, 275 App. Div. 743, 87 N. Y. S. 2d 745 (1949), (defendant appeared alone and was forced to wear clothing corresponding to witness' earlier description); *Johnson* v. *State*, 44 Okla. Crim. 113, 279 Pac. 933 (1929) (only defendant produced).

Wigmore on Evidence, Vol. 8, 3d ed., § 2265, p. 374 has written:

> "Looking back at the history of the privilege [against compelled self-incrimination] (*ante*, § 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence."
>
> * * * *
>
> "In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in constitutional definitions, but *testimonial compulsion*." (italics in original) Thus
>
> "an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because [fol. 54] it does not call upon the accused as a witness, i.e., upon his testimonial responsibility."
>
> * * * *
>
> "What is obtained from the accused by such action is not testimony about his body, but his body itself (*ante*, § 1150). Unless some attempt is made to se-

cure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

The law has made and continues to make a definite distinction between testimonial evidence and identification. And for good reason. Physical characteristics such as facial features, color of hair and skin, height, weight and even manner of walk may be observed by all who may be present at the scene of a crime. A person does not become a witness against himself merely by possessing these individual characteristics. When it was discovered that the fingerprints of persons differed one from the other, this form of identification was added to the list of reliable distinguishing features which the police and the prosecution may, without violating the privilege, compel a defendant to reveal. Thus for generations it has been legal to require the accused to stand up in court for purposes of identification, *State* v. *Carcerano*, 238 Ore. 208, 390 F. 2d 923 (1964); *People* v. *Oliveria*, 127 Cal. 376, 59 Pac. 772 (1899). However, the opportunity for courtroom identification may well first be presented many months after the occurrence of the crime. Interests of the accused and society alike demand that this opportunity be afforded at the earliest possible moment. When this "moment" exists will of necessity be dependent upon the facts and circum- [fol. 55] stances of each particular case. No ironclad rules can be or should be laid down. But what better guides can there be than common sense?[3]

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[3] Kamisar, Criminal Justice in Our Time, Magna Charta Essays (University of Virginia Press 1965), pp. 9-10:

"Here misty ideals collide with the grim 'realities' of law enforcement. Here we are confronted, both with the Constitutional and normative levels, with the most important question, or cluster of questions, in the entire field of criminal procedure today.

"I am not talking about detention for such purposes as fingerprinting, placing in line-ups, confronting victims or witnesses and checking out alibis. Assuming the suspect has been lawfully arrested, such station house screening is both necessary and desirable."

Helpful guides to decision may be found in other cases, which involved federal prosecutions. Most recently (September 9, 1965) the Court of Appeals for the District of Columbia had to deal with an identification after arrest problem (*Kennedy* v. *United States*, Docket No. 19202, —— F. 2d ——). There police officers informed by radio of a crime arrived at the scene to find a man being forcibly restrained by two men who had heard womanly screams and had seen two men running from a house. The police took the man (Kennedy) into the house where they found two women handcuffed to a stair rail. The women identified Kennedy as one of their assailants. Upon the trial they identified the accused in open court and testified as to their prior identification even as did Mrs. Behrendt here. Upon appeal Kennedy's counsel urged that the complainants should not have been permitted to testify against him because the identification had derived (1) from an arrest without probable cause; (2) from an illegal detention; and (3) that his Sixth Amendment right to counsel had been infringed because he had been without counsel when identified at the scene of the robbery. The court found probable cause for the arrest and that "Appellant [fol. 56] [Kennedy] made no confession and there is nothing to suggest a police purpose to elicit a confession." The court noted, after finding that there was probable cause for the arrest, that it is a policeman's "function to try to minimize the incidence of erroneous detentions and charges; taking Appellant into the presence of the complaining witnesses was entirely appropriate. Had the officers not done this, Appellant would have been subjected to continued detention, a trip to the station, to booking and line-up processes, unnecessarily if the complainants had said he was not one of the attackers. The police should not have overlooked the possibility of his exoneration, which could be easily and swiftly resolved by 'quick verification' in a confrontation." —— F. 2d ——, ——.

In *Copeland* v. *United States*, 343 F..2d 287 (D.C. Cir. 1965), the appellant after arrest was taken by the police to the Western Union office where the robbery had occurred to be identified by one of the victims. Then taken to the

police station, he was identified there by a victim of a different and previous robbery. The conviction was affirmed.

In *Caldwell* v. *United States*, 338 F. 2d 385 (8 Cir. 1964), the accused had been put in a line-up and identified by eyewitnesses. The court held that there was no self-incrimination, saying at p. 389: "The mere viewing of a suspect under arrest by eyewitnesses does not violate his constitutional privilege because the prisoner is not required to be an unwilling witness against himself. There is a distinction between bodily view and requiring an accused to testify against himself." And in *People* v. *Gardner*, 144 N. Y. 119, 128 (1894) the New York Court of Appeals said: "A murderer may be forcibly taken before his dying victim for identification, and the dying declarations of his victim may then be proved upon his trial for his identification."

[fol. 57] The principle that an arrested person "may be exhibited for identification to the person injured by the commission of the crime," *Downs* v. *Swann*, 111 Md. 53, 61; 73 Atl. 653, 655 (1909) is so consistent with fundamental fairness both to the accused and society that there is little point in further elaboration except to take notice that the law sanctions many methods of identification which do not invade the field of testimonial compulsion such as the use of fingerprints and photographs, including photographs of body scars. See *Barletta* v. *McFeeley*, 107 N. J. Eq. 141, 152 Atl. 17 (1930); *People* v. *Smith*, 142 Cal. App. 2d 287, 298 P. 2d 540 (1956); *State* v. *Emerson*, 266 Minn. 221; 123 N. W. 2d 382 (1963); *O'Brien* v. *State*, 125 Ind. 38; 25 N. E. 137 (1890).

The accused may even be forced to perform some physical act such as putting on eyeglasses, *People* v. *Tomaszek*, 54 Ill. App. 2d 254, 204 N. E. 2d 30 (1964); submitting to a physical examination, *McFarland* v. *United States*, 150 F. 2d 593 (D. C. Cir. 1945); having a handkerchief put over his face to simulate his appearance at the time of the robbery, see *Ross* v. *State*, 204 Ind. 281, 182 N. E. 865 (1932) and *Key* v. *State*, 30 Okla. Crim. 92, 242 Pac. 582 (1925); or giving a blood sample. See also *Walton* v. *City of Roanoke*, 204 Va. 678, 133 S. E. 2d 315 (1963). In summary, as Mr. Justice Holmes said in *Holt* v. *United*

States, 218 U. S. 245 (1910), the prohibition of the Fifth Amendment "is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material" (at 252).

Fourteenth Amendment

(Due Process)

Since courtroom identification, which usually takes place many months after the occurrence of the crime, is permis- [fol. 58] sible, interests of the accused and society alike demand that the opportunity to identify be afforded at the earliest possible moment when the likelihood of an accurate identification is greatest. Of course, in the interests of truth and fairness to the suspect, this opportunity should be afforded, where possible, under circumstances most likely to lead to a disinterested decision by the identifier. When a proper moment exists will of necessity be dependent upon the facts and circumstances of each particular case. No ironclad rules can be or should be laid down. Although federal courts should be loath to interfere with state court evidentiary matters which go primarily to the weight of evidence admitted, it may be that an identification procedure could be so unfair as to amount to a violation of the Fourteenth Amendment's due process guarantee.

Here, however, defendant was not deprived of due process. A line-up was out of the question; a show-up could be conducted only where Mrs. Behrendt was then confined—the hospital. She had had more than a fleeting glimpse of the attacker. Although stabbed many times, she was not unconscious and the attacker had remained in full view in the brightly lighted kitchen for a considerable period of time after killing Dr. Behrendt and stabbing her. Upon the trial, there was no limitation to the cross-examination directed towards the weight of her hospital identification testimony. There is no basis for holding that Stovall was not accorded due process on his trial by the State of New York or that he was deprived of Fourteenth Amendment rights.

Sixth Amendment

(Right to Counsel)

Appellant's counsel now argues that at the time of arraignment "his [appellant's] constitutional right to coun-
[fol. 59] sel had come into being and that failure of the arraigning Magistrate to adequately advise the defendant resulted in the denial of the right." The charge of failure of duty against a judge warrants factual investigation. When Stovall was brought before the Magistrate on August 25th, he was advised of his right to counsel and was asked whether he had counsel or desired to secure his own counsel. He replied that he did so desire. To give him this opportunity, the Magistrate adjourned further proceedings until August 31st. On that day [August 31st], Stovall informed the Magistrate, in response to the question as to whether Stovall had obtained counsel, that he had not communicated with any relatives to see if they would get a lawyer for him, but that he had been told in the jail that "they" said one would be assigned. The Magistrate then again told Stovall of his rights, "the first of which is the right to the aid of a lawyer." Turning to a well-known criminal defense lawyer, the Magistrate asked, "Counsel George Mulry, would you be willing to help this man protect his rights in this Court at this time?" Counsel agreed. The court told Stovall to confer with him and that "He is a lawyer who will volunteer his services to help you now protect your rights." A short recess was declared after which, through counsel, Stovall demanded a hearing which the court set for the following day "so you [Stovall] could be confronted with the witness and the judge could decide whether or not a crime had been committed." However, on August 31st, Stovall was indicted for first degree murder by the grand jury and the case thereafter came under the jurisdiction of the County Court.

The New York Code of Criminal Procedure § 188 provides that the Magistrate inform the prisoner of "his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." He must "allow
[fol. 60] the defendant a reasonable time to send for coun-

sel, and adjourn the examination for that purpose." *Id.* § 189. The Magistrate followed this statute punctiliously. In the light of this record, the charge of failure to advise is completely unsupported by, and quite contrary to, the facts.

Appellant's reference (in his brief) to his situation as amounting to "the release of the accused to his accusers," is equally unwarranted. Stovall was not so released; he had been arrested by the police; was in their custody; and, because of his expression of desire to obtain his own counsel, would remain in their custody until further proceedings were held. While in such custody, the police could have brought in any potential witness for identification purposes, including the victim, except for the fact that she, seriously injured, could not be moved from the hospital room. The only variation because of the necessity of the situation was the hospital room identification instead of a police station identification.

The record completely refutes appellant's statement (in brief) that "from this denial of right [to counsel] (a premise which may be mildly described as inaccurate) the *prosecutor* was enabled to *create* evidence used to secure conviction at the subsequent trial" (italics in original). There was no denial of the right to counsel; the Magistrate in fact honored Stovall's request that he be permitted to obtain his own attorney. Nor did the continuation of police efforts to secure the best evidence of identification before Stovall had an opportunity to engage his own counsel result in any incriminating statements or confessions because he made none.

If Stovall had had counsel, what could counsel have done to thwart the identification? He could not have demanded Stovall's immediate release so that no one might see him. [fol. 61] He could not have arranged to have Stovall continuously wear a hood or mask over his face to avoid identification, nor could he have ordered the police forthwith to halt their identification activities. Counsel would not have said "Cease further efforts at identification; Stovall has admitted his guilt" because Stovall had not done so.

Again adverting to the opinion in *Kennedy, supra,* counsel could not have prevented the hospital room identification because "An accused has no right to be viewed in a line-up rather than singly." Here, as in *Kennedy,* counsel could not "have altered the course of events" as to identification, and since no confession or "any other evidence respecting which counsel could have rightfully advised Appellant to refuse to yield" was obtained, there was no deprivation of Sixth Amendment rights.

Lastly, appellant contends that he was denied a constitutionally adequate hearing on his motion to suppress. In the New York Court of Appeals to which an appeal from Stovall's conviction had been taken, the remittitur was amended to show that that Court had passed upon the contention that he had been convicted on evidence obtained by unlawful search and seizure. The Court held that his constitutional rights had not been violated (13 N. Y. 2d 1178; 248 N. Y. S. 2d 56).

The District Court was well aware of the arguments appellant now makes but found that the articles claimed to have been illegaly seized, namely, a white jacket, a pair of trousers and a hat, were not offered in evidence against Stovall by the People but were marked for identification by the defense. This action was entirely voluntary and must be attributed to defense strategy rather than a checkmate move because the District Attorney had announced at the opening of the trial that he would offer no items [fol. 62] obtained from the allegedly illegal search. Nor could the "poison fruit" doctrine have led to the arrest because there was more than ample evidence to establish an earlier and independent source of information. Furthermore, since, as the Court found, "The proof is convincing that the articles were voluntarily turned over to the police by the sister of Stovall" and were not used by the People, the conclusion that "The record establishes that no constitutional rights of defendant were violated" is sound.

Although a capital case requires the most careful scrutiny, these requirements have been met. The highest court of New York has reviewed his case (13 N. Y. 2d 1094; 246 N. Y. S. 2d 410); the District Court considered and

weighed the errors complained of, as has this Court. Upon the law and the facts, no infringement of any constitutional right is presented.

Affirmed.

LUMBARD, *Chief Judge* (with whom Judge Kaufman concurs), concurring:

I Concur.

I agree with my brother Moore that the hospital room show-up did not violate any of Stovall's constitutional rights. The police found Mrs. Behrendt grievously wounded and in a state of severe shock at about 1:00 A.M. on August 24. At that time, in an incomplete and somewhat confused statement made to a police officer before she was given medical treatment, Mrs. Behrendt indicated that she had seen her attacker. The police were not allowed to interview Mrs. Behrendt on August 24, the day of her extensive surgery, or to present Stovall to her for identification purposes. They were therefore fully [fol. 63] justified in continuing their investigation by bringing Stovall to the hospital at 1:00 P.M. on August 25, after Stovall's morning arraignment.

The type of emergency facing the police is relevant to the question of whether the show-up procedure was so unfair as to amount to a denial of due process. I agree with my brother Moore that the method of an identification normally goes to the weight of the evidence. Given the circumstances surrounding the identification, the full opportunity afforded defense counsel to cross-examine Mrs. Behrendt at trial, and the positive court room identification made by Mrs. Behrendt, I find no violation of Stovall's right to due process. Likewise, Stovall's Sixth Amendment right to counsel argument has no merit, particularly since counsel could have had little or no effect on what took place in the hospital room.[1] And I agree with the

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[1] Indeed, I wonder whether the right to counsel doctrines of *Escobedo* v. *Illinois* and *Massiah* v. *United States* apply to circumstances which do not ultimately involve a danger of self-incrimination. A person lawfully arrested and detained has no right to

majority's disposition of the Fifth Amendment claim.

Unlike my brother Friendly, I see no need to inquire into whether the police violated New York law when they failed to deliver Stovall to a sheriff immediately after arraignment. Whether or not there may have been tech- [fol. 64] nical violation of New York law is no grounds for reversal here. No objection was made to this procedure at trial. Therefore there was no need for the court to inquire into whether it was proper and appropriate for the police to retain custody of Stovall following his production before the district court judge. Nor is there a federal constitutional right to be committed to a sheriff rather than to the police pending arraignment. Since there was no due process violation in the hospital room identification, the police procedure violated none of Stovall's federal rights.

I differ with my brother Moore's discussion of the prejudicial error issue, although I agree that the use made of the hospital room identification at Stovall's trial did not amount to prejudicial error even if that identification procedure itself violated Stovall's rights.

The Supreme Court has prescribed a rigorous standard of prejudicial error when dealing with police activities that violate fundamental constitutional rights. See, e.g., *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *United States* v. *Guerra*, 334 F. 2d 138, 143-47 (2 Cir.), cert. denied, 379 U. S. 936 (1964). Assuming for the moment that the hospital room identification violated Stovall's constitu-

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have his lawyer present to supervise all his activities that come within the realm of prison or detention house administration. Likewise, I should think that the police can search the defendant and his effects in the absence of counsel. Only when police conduct threatens to violate a personal right of the defendant that retains vitality during detention—e.g., the privilege against self-incrimination—or when police practices unfairly prevent the defense attorney from preparing his case—a literal deprivation of the right to counsel—must a court interfere to guarantee that the right is properly preserved. Viewed in this light, common sense finds a clear distinction between the case supposed by Judge Friendly in his dissent, where counsel is excluded from a court room identification at trial, and the failure to appoint counsel to accompany an accused to a pretrial identification. Cf. *United States* v. *Cone*, —— F. 2d ——, n. 13 (2 Cir. 1965).

tional rights, testimony as to that identification at trial was reversible error if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U. S. at 86-87.

Mrs. Behrendt made a positive court room identification of Stovall, and she indicated that this identification was the product of her recollection of the night of the crime.[2] [fol. 65] It seems highly probable that the use made of the hospital room procedure at trial did not influence this court room identification.[3] Under these circumstances, the

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[2] Relevant portions of Mrs. Behrendt's direct testimony are as follows:

"Q. What did you observe or what did you hear from that point on? A. I saw he was tall and strong and medium color, a medium brown, and I saw his face clearly because I jumped at him head on, and then a moment later when he stabbed me I fell down and I was already on the floor when my husband—when I saw my husband dead . . .

"Q. Now, this man that you speak of, that you saw, did you ever see him before that night? A. No.

"Q. Have you ever seen him since? A. Yes.

"Q. Are you able to point out who he is? A. Yes.

"Q. Will you do so? A. This Negro sitting there (indicating).

"The Court: Indicating the defendant.

"A. (Continuing) In the light coat.

"The Court: Indicating the defendant.

"The Witness: What?

"The Court: Indicating the defendant, you say?

"The Witness: Yes.

"Q. Did you ever see him anywheres before you saw him here in court today? A. Yes, in the hospital.

"Q. Do you know who he was accompanied by at that time? A. By several detectives, I think.

"Q. Do you know approximately when this was with relation to the time that you went into the hospital? A. I'm not quite sure. It was a few days after the operation when I was fully conscious. [It was in fact one day.]"

This was the only reference in Mrs. Behrendt's testimony to the hospital room identification until defense counsel's thorough cross-examination on that subject.

[3] Mrs. Behrendt testified that she had not seen Stovall since the hospital room identification. Likewise, the prosecutor in his opening statement mentioned the existence of the hospital room incident but

impact of testimony as to the hospital room incident was cumulative.

Neverthless, there remains the possibility that Mrs. Behrendt's ability reliably to identify Stovall at trial was in fact psychologically colored by the impact of the previous confrontation in the hospital room. This "prejudice" does not depend upon whether there was testimony as to [fol. 66] the hospital room identification. And the only way to eliminate this aspect of prejudice would have been to exclude the hospital room identification *and* to prohibit Mrs. Behrendt from making any identification at trial. I am unwilling to hold that so broad an exclusionary rule should flow from a constitutionally infirm pre-trial identification because of the likelihood that an unbiased court room identification can still be made seems great and because eye witness evidence, despite its human frailties, plays a vital role in criminal prosecutions. I am particularly unwilling to exclude all identification in this case because Mrs. Behrendt's testimony seems reliable and because the alleged police improprieties were unintentional and technical. It was proper to admit this evidence and to allow the jury to weigh its reliability.

If Mrs. Behrendt should be permitted to make a court room identification, then use of the hospital room identification becomes cumulative and harmless. More significantly, it is *fairer* to Stovall to *permit* testimony and full cross-examination concerning the hospital room procedure because only then can the jury know that the unequivocal court room identification may be the product of previous police persuasion rather than an accurate recollection of the night of the crime. At Stovall's trial, these considerations are evident: outside of the prosecutor's opening address, the first mention of the hospital incident came

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he said that he could only speculate as to whether Mrs. Behrendt would be able to make a court room identification. Since Mrs. Behrendt was excluded from the court room (as a witness) when the incident was brought out during the cross-examination of two policemen, and since no mention was made of it during her direct testimony until after her court room identification, it seems doubtful that the use made of the hospital incident at trial colored her court room identification.

during the cross-examination of two policemen who accompanied Stovall to the hospital. And defense counsel concentrated heavily on this incident in his cross-examination of Mrs. Behrendt while the prosecutor only brought it out casually. Consequently, I conclude on the facts of this case that the use made of the hospital room identification not only was harmless error but indeed was the fairest method of handling Stovall's trial.

[fol. 67] FRIENDLY, *Circuit Judge*, with whom WATERMAN, *Circuit Judge*, joins (dissenting):

The facts giving rise to the issue here[1] were stated as follows in the panel opinion of March 31, 1965:

> Section 192 of New York's Code of Criminal Procedure prescribes, so far as here pertinent, that "If an adjournment be had for any cause, the magistrate must commit the defendant for examination," and § 193 adds that the commitment shall be to the sheriff, save in New York City where it is to be to the commissioner of correction. We were told at the argument that the sheriff of Nassau County does not have a representative available in the arraigning courts and that responsibility for placing committed defendants in his hands rests with the police. After the arraignment but apparently before Stovall was handed over to the sheriff, two detectives took him, handcuffed to one of them, to the hospital where Mrs. Behrendt had undergone extensive surgery, and into her room. Three high police officers and two prose-

[1] The statement of the majority that this claim was "not even presented to the court below" is not wholly accurate. As the panel opinion explained, it was raised in Stovall's hand-written petition but was not considered by Judge Wyatt since in the district court counsel had relied entirely on the point dealt with in the final paragraphs of this court's opinion. The panel opinion also noted that the Assistant District Attorney commendably had not relied on the failure of Stovall's counsel to argue the point to Judge Wyatt and sought disposition by us on the merits.

cutors were also there. One of the police officers asked Mrs. Behrendt whether Stovall was "the man"; she said he was. At some time one of the officers asked Stovall "to say a few words for voice identification"; he did—just what does not appear.

[fol. 68] The panel recognized that "the privilege [of the Fifth Amendment against self-incrimination] does not invest a defendant with immunity from exposing himself to identification, even if this includes some movement, such as going from the jail to the courtroom for trial or rising, if called upon . . . and it may well be argued that use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently from that of the arm muscles."[2] But this truism does not settle whether Stovall was deprived of his Sixth Amendment right to counsel; although the two rights often overlap, they are not congruent. No one would suppose, for example, that because the Fifth Amendment does not protect a defendant from being compelled to stand up in court and try on a garment found at the scene of the crime, the prosecutor could require defense counsel to absent himself during such an episode. It is beyond dispute that the preliminary hearing was part of a "criminal prosecution," that Stovall had become an "accused," and that he was thus entitled "to have the Assistance of Counsel for his defense." *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *White* v. *Maryland*, 373 U.S. 59 (1963). This distinguishes *Kennedy* v. *United States*, —— F. 2d —— (D. C. Cir. 1965), and other cases of identification during the investigative stage, on which the majority rely. I fail to understand why, in the interval between preliminary hearing and trial, a defendant is not entitled to the assistance of counsel when the state wishes to make use of him to obtain evidence that will have independent testimonial value—particularly when *Massiah* v. *United States*, 377 U. S. 201 (1964), has obliterated any distinction

[2] The reference to moving the arm muscles was followed by citation of Mr. Justice Holmes' well-known opinion in *Holt* v. *United States*, 218 U. S. 245, 252 (1910).

[fol. 69] between judicial and extra-judicial action by the police once the "criminal prosecution" has begun.[3]

The majority say that after Stovall's appearance before the state judge he "had to remain in police custody" and that his custody was lawful. I see no basis for these statements. New York properly recognizes that, after the preliminary hearing, the prisoner comes under a new legal regime and his lawful custodian is the sheriff, not the police; the only thing the police could properly do with Stovall at that time, see § 193 of the New York Code of Criminal Procedure, was to place him in the hands of the custodial authorities just as soon as possible. Those authorities would have been bound not only to prevent Stovall from removing himself but also to prevent his being removed or molested by anyone else. The assumption, implicit in the court's opinion, that such a prisoner is subject to the beck and call of the police is surely wrong, see [fol. 70] Judge Finletter's fine opinion in *Commonwealth* v. *Brines*, 29 Pa. Dist. 1091 (C. P. 1920). Once Stovall was in the sheriff's custody, the latter could not lawfully

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[3] I see no basis for Chief Judge Lumbard's "wonder whether the right to counsel doctrines of Escobedo v. Illinois and Massiah v. United States apply to circumstances which do not ultimately involve a danger of self-incrimination." Once it has been held, as these cases clearly did, that the Sixth Amendment may apply outside the courtroom and when, as in *Massiah*, the accused did not even know of the presence of the police or the prosecutor, I see no escape from the conclusion that, if the right has attached, the accused is entitled to the assistance of counsel when the prosecution attempts to use him as a means of procuring evidence to be offered at the trial. I cannot believe my brothers would go to the extent of saying that, after arraignment or indictment, counsel could be excluded while the defendant was being subjected to medical examination or blood or handwriting tests. If counsel cannot be excluded from such procedures, common sense does not supply me with a satisfactory answer why he can be barred from an identification which his client is compelled to attend—although no one would dream of excluding him from a less meaningful one in the courtroom; the argument that, although excluded from the former, he will have an opportunity to attack both identifications at trial, does not seem sufficient for preventing him from rendering all possible assistance to the accused before the witness' impression hardens. I fear that my brothers simply have not been able to adjust their sights to the Supreme Corut's new concept that the right to the assistance of counsel embraces activities outside the courtroom.

release him to the police without an order of the court; if the prosecution had sought such an order, counsel could have been appointed and the difficulty that has here arisen would have been avoided.[4]

Other arguments advanced by the majority are equally unconvincing. They say the police could have taken Stovall to the hospital for identification before arraignment despite the absence of counsel, so why not thereafter? But many things can be done in the absence of counsel in the investigative stage before the "criminal prosecution" begins, which cannot lawfully be done later, as *Massiah* v. *United States*, *supra*, plainly shows. The rhetorical question as to what counsel could have done was answered in the panel opinion many months ago:

> He might have persuaded the prosecutor, in the state's own interest, if not to forego the hospital identification, at least to assure conditions better designed to avoid suggestion. He might have persuaded the judge to direct that Stovall be immediately sent to and then kept in jail pending trial, or be put before Mrs. Behrendt only under fair conditions such as a line-up, or be accompained by counsel who might question her . . . . Or, as a last resort, he might have advised Stovall to refuse to go, or to remain silent if taken by force.

[fol. 71] The case thus bears no resemblance to the recent decision in *Rigney* v. *Hendricks*, —— F. 2d —— (3 Cir. 1965), with which I am in accord, where counsel were notified of the intention to place an accused prisoner in a line-up held under scrupulously fair conditions and with counsel present. We have been told in no uncertain terms that, in dealing with a capital charge, as Stovall's was at the time, we are not to speculate on whether prejudice resulted from the absence of counsel, *Hamilton* v. *Alabama*, *supra*, 368 U. S. at 55; here, as there, "the degree of prejudice can never be known."

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[4] It is unnecessary to decide in this case the manner and extent to which Stovall could have been exposed to viewing in the course of normal jail routine. Cf. *Morris* v. *Crumlish*, 239 F. Supp. 498, 499 (E. D. Pa. 1965).

My brothers also intimate that the police and the prosecutor were confronted with an emergency and that they may have thought the visit to the hospital to be in Stovall's own interest. The latter argument ignores the hugh amount of circumstantial identification the excellent police investigation had produced; moreover, if the state officials were motivated by such solicitude, the natural course would have been to ask Stovall whether he wanted to go. The emergency argument falls both on the facts and on the law. Grievous as Mrs. Behrendt's injuries had been, nothing in the record indicates that her life was any longer considered to be in peril when Stovall was brought before her; the presence of five police officers and prosecutors in her hospital room would argue to the contrary—and also tends to negate the suggestion that Stovall had to be brought in alone. If Mrs. Behrendt's condition had been as serious as my brothers suppose, nothing prevented the prosecutor from informing the state district judge at the preliminary hearing that Stovall had to be taken immediately before her, and suggesting that counsel be assigned forthwith for the limited purpose of advising him in that regard—rather than standing silent when Stovall told the [fol. 72] judge of his desire to have counsel and then carting him off to a confrontation by the victim which counsel might have done something to mitigate.

My brothers also assert that in any event admission of the hospital identification was cumulative and therefore not prejudicial to Stovall, although they do not altogether agree on the grounds. Addressing itself to this point the panel said:

> The statement was inculpatory on the central question of his presence on the occasion of the crime; indeed, Mrs. Behrendt's was the only identification that was testimonial rather than circumstantial, and the jury asked that all her testimony be reread. A claim of harmless error as to a conviction must surmount an exceedingly high hurdle, even on collateral attack, when the error was constitutional and the punishment is death. See *Bruno* v. *United States*, 308 U. S. 287 (1939); *Kotteakos* v. *United States*, 328 U. S. 750, 764-65 (1946); *Stewart* v. *United States*, 366

U. S. 1, 9-10 (1961); *Hamilton* v. *Alabama*, *supra*, 368 U. S. 52. The hurdle is too high for this case.

Despite the labored attempt to prove the contrary, the hospital identification, featured in the prosecutor's opening, must have had a far greater effect on the jury than the identification in court some months later; common sense supports Dean Wigmore's observation, "After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity." 4 Evidence § 1130 at 208 (3d ed. 1940). The self-created dilemma of the concurring opinion, that exclusion of the hospital identification would prevent identification at the trial, is illusory; exclusion of the former would [fol. 73] simply have required the prosecutor to rest on Mrs. Behrendt's memory of the night of the dreadful crime and on her courtroom identification. If, in this posture, defense counsel had brought out the hospital identification, as no experienced counsel would, he would have had only himself to blame.

Although there can assuredly be a waiver of the right to counsel between arraignment and trial, no one has seriously suggested that we could find that, when, without any previous discussion, this Negro, of low mental capacity, was taken to the hospital by a detective to whom he was handcuffed. I scarcely regard Stovall as a sympathetic character, and I am glad that the crime was recent enough to permit an effective retrial. But I continue to believe that, in the absence of overriding necessity or consent, a man who has been brought before a judge on a charge of a capital crime, and has expressed his desire for counsel, is entitled under the Constitution to be let alone until he gets one. That is all Judge Marshall and I decided last March, and I adhere to it.

SMITH, *Circuit Judge* (dissenting):

I dissent. I agree with Judge Friendly that "in the absence of overriding necessity or consent, a man who has been brought before a judge on a charge of a capital crime, and has expressed his desire for counsel, is entitled under the Constitution to be let alone until he gets one."

[fol. 74]

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES EX REL. THEODORE STOVALL,
RELATOR-APPELLANT

v.

WILFRED L. DENNO, as Warden of Sing Sing Prison,
Ossining, New York, RESPONDENT-APPELLEE

ORDER VACATING JUDGMENT OF MARCH 31, 1965—
January 31, 1966

A petition for rehearing in banc having been granted, additional briefs having been filed and the action having been taken under advisement without further oral argument,

Upon consideration thereof, it is

Ordered that the opinion of March 31, 1965 of a panel of this court and the judgment entered thereunder be and they hereby are vacated.

A. DANIEL FUSARO
Clerk

[fol. 75]

[File Endorsement Omitted]

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES EX REL. THEODORE STOVALL,
RELATOR-APPELLANT

v.

WILFRED L. DENNO, as Warden of Sing Sing Prison,
Ossining, New York, RESPONDENT-APPELLEE

JUDGMENT—January 31, 1966

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

[fol. 77]

[File Endorsement Omitted]

[fol. 78]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. 1565 Misc., October Term, 1965

THEODORE STOVALL, PETITIONER

v.

WILFRED DENNO, WARDEN

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 20, 1966

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1436 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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